**NO. 03-20-00129-CV**

**IN THE COURT OF APPEALS**
**THIRD COURT OF APPEALS DISTRICT OF TEXAS**
**AUSTIN, TEXAS**



Qatar Foundation for Education, Science and Community Development,

Appellant

v.

Ken Paxton, Texas Attorney General and Zachor Legal Institute,

Appellees

On appeal from the 200th District Court of Travis County, Texas
Trial Court Case No. D-1-GN-18-006240

# REPLY IN SUPPORT OF EMERGENCY MOTION FOR REVIEW OF TRIAL COURT'S ORDER DENYING APPELLANT'S MOTION TO SUPERSEDE JUDGMENT PENDING APPEAL

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Appellant Qatar Foundation for Education, Science and Community Development ("Appellant" or "QF") files this Reply in support of its Rule 24.4(a) emergency motion for review of the trial court's denial of its motion to supersede the judgment (the "Motion for Review") and respectfully shows the Court as follows:

## I. SUMMARY OF THE ARGUMENT

QF filed this suit against Ken Paxton, Texas Attorney General ("Attorney General") to prevent the disclosure of its confidential and proprietary information under the Texas Public Information Act pursuant to the Attorney General's Letter Ruling OR2018-20240. The trial court, however, held that it had no jurisdiction to hear QF's claims and then denied QF's motion to supersede the final judgment. QF therefore sought emergency relief from this Court to supersede the trial court's jurisdictional ruling while the appeal is pending.

QF's Motion for Review presents two well-settled principles of Texas law upon which this Court should supersede the trial court's judgment. First, the trial court erred as a matter of law in holding that an order granting a plea to the jurisdiction is not a "judgment" which may be superseded under Rule 24.4. Second, the trial court abused its discretion by refusing to supersede the final judgment because if the records at issue are released it would render QF's appeal moot.

The Court asked for responses from the Attorney General and Intervenor-Appellee Zachor Legal Institute ("Zachor"). The Attorney General, the Defendant in the underlying lawsuit, "does not oppose this motion and believes it is appropriate for the Court to prevent the release of the information at issue in order to preserve its jurisdiction to decide the merits of the appeal." [Attorney General March 16, 2020 Letter to Clerk]

Zachor does oppose the Motion for Review, but its response primarily argues the merits of QF's underlying claims and the jurisdictional issue that is the subject of this appeal. Zachor's arguments regarding the propriety of this emergency relief are sparing and rely on inapposite decisions and mischaracterizations of QF's arguments. In addition, while Zachor claims that there is "no evidence" to support the requested relief, QF presented substantial record evidence of the irreparable harm it faces if the records at issue are released. Zachor has simply chosen to ignore that evidence.

This Court should step in to preserve the status quo, its own jurisdiction over the appeal, the confidentiality of the documents at issue, and QF's right to a trial on the merits in the event it prevails on appeal. QF requests that the Court enter an order superseding the trial court's determination that it has no jurisdiction over QF's claims and preventing Zachor from attempting to enforce the Attorney General's Letter Ruling pending appeal.

## II. ARGUMENT

### A. The Court's Order Granting A Plea To The Jurisdiction Is Subject To Texas Rule of Appellate Procedure 24.

In the trial court, Zachor argued that an order granting a plea to the jurisdiction was not subject to Rule 24 regarding suspension of enforcement of judgments because it was not a "judgment" at all. [Exhibit 8 to Motion for Review at 1 ("Both TRAP Rules 24 and 25 apply to 'judgments,' not to orders of dismissal.")]. Now on appeal, Zachor has pivoted from that clearly erroneous argument and concedes that "a dismissal of all claims and all parties is final and potentially appealable." [Zachor Response at 6.] Thus, Zachor essentially admits that the trial court erred as a matter of law in denying Appellant's Motion to Supersede "because there is no 'judgment' in this case that any party could enforce." For this reason alone, the trial court's denial of QF's Motion to Supersede should be reversed.

Instead, Zachor re-casts the issue in its Response as "whether there is anything *enforceable* about such an order that, as a practical matter, can be suspended." [Zachor Response at 6.] In making that argument, Zachor relies on three inapposite decisions that do not support its argument:

- *El Caballero Ranch, Inc. v. Grace River Ranch, L.L.C.*, No. 04-16-00298-CV, 2016 Tex. App. LEXIS 9180 (Tex. App.—San Antonio Aug. 24, 2016, no pet.). This case did not involve a plea to the jurisdiction. The court simply required a judgment creditor to post a supersedeas bond pending the outcome of the appeal of a final judgment declaring rights to real property. *Id*. at *15-16.

- *Bradshaw v. Sikes*, No. 02-11-00169-CV, 2013 Tex. App. LEXIS 2723 (Tex. App.—Fort Worth Mar. 14, 2013, pet. denied). The trial court granted a supersedeas bond pending appeal of a take-nothing judgment. *Id*. at *4. In the passage Zachor quotes, the appellate court rejected the argument that the supersedeas bond deprived the trial court of jurisdiction to decide the merits of a separate, but related action. *Id*. at *14-15.

- *Kaldis v. Aurora Loan Servs.*, 424 S.W.3d 729 (Tex. App.—Houston [14th Dist.] 2014, no pet.). This case did not involve a plea to the jurisdiction. In the pages Zachor cites, the court declined to a stay a take-nothing judgment where the "main goal" of the stay was to postpone enforcement of a final judgment in a separate proceeding for foreclosure and eviction. *Id*. at 737-738.

Moreover, Zachor failed to address the cases cited in QF's Motion for Review in which courts did supersede orders granting a plea to the jurisdiction and other "take-nothing" judgments. *In re Park*, No. 05-19-00774-CV, 2019 Tex. App. LEXIS 9032 at *2, 4 (Tex. App.—Dallas Oct. 10, 2019, no pet.) (granting an injunction preventing removal of a monument pending the appeal from a "final judgment" granting a plea to the jurisdiction because if the monument is "moved, demolished, damaged, or sold this Court's judgment would be a nullity."); *Haedge v. Cent. Tex. Cattlemen's Ass'n*, No. 07-15-00368-CV, 2016 Tex. App. LEXIS 2311, at *4-8 (Tex. App.—Amarillo March 3, 2016, no pet.) (superseding a take-nothing judgment, rejecting appellees argument that there was neither a judgment debtor nor anything to be suspended because the take-nothing judgment effectively removed appellants' right to graze cattle, which was the heart of the appeal and "refusing to

… supersede would deny appellants their appeal by rendering it moot."); Motion for Review at V.A.

Zachor's argument that there is nothing "enforceable" about the judgment below ignores these cases and mischaracterizes the nature of QF's claims and the judgment on appeal. It was Texas A&M's request for a ruling from the Attorney General that suspended its obligation to provide the records at issue under the Texas Public Information Act. *See* TEX. GOV'T CODE §§ 552.301 (setting forth procedure for requests to the Attorney General), 552.302 (providing that in the absence of such a request, the information "is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information"). When the Attorney General issued Letter Ruling OR2018-20240 and found that certain records must be released, QF filed suit against the Attorney General to challenge its Letter Ruling and thereby prevent the release of QF's proprietary information. The trial court's dismissal of the case on jurisdictional grounds thus has the same practical effect as an adverse ruling to QF—because the challenge to the Attorney General's Letter Ruling is no longer pending, Zachor could seek to enforce the Attorney General's ruling and compel the disclosure of the documents at issue.

Zachor's intervention in this suit further undermines its argument that there is nothing "enforceable" about the judgment below. QF brought suit pursuant to

§ 552.325, which recognizes the propriety of a suit filed by a "person or entity … seeking to withhold information from a requestor." The Texas Public Information Act creates certain rights and obligations between the parties in such a suit. The party bringing the suit may not file against the requestor, but must notify the requestor. TEX. GOV'T CODE § 552.325(a), (b). The requestor may also intervene, which requires it to have a "justiciable interest" in the case. *See* TEX. GOV'T CODE § 552.325(a); *In re Union Carbide Corp.*, 273 S.W.3d 152, 154-55 (Tex. 2008). If the Attorney General seeks to enter into a settlement that would allow the information at issue to be withheld, it must notify the requestor and allow it an opportunity to intervene and oppose the settlement. TEX. GOV'T CODE § 552.325(a).

Zachor's interest as a requestor of QF's proprietary information is inextricably intertwined with a challenge to the propriety of the Attorney General's ruling. If QF's suit had been permitted to proceed and Zachor attempted to obtain the contested information while that suit was pending, QF could have sought relief from the trial court to prohibit Zachor from doing so. QF's only recourse now is in this Court.

The relief sought here is to maintain the status quo by preserving the pendency of QF's suit against the Attorney General over Zachor's ability to obtain QF's proprietary information. Suspending the trial court's judgment is required to protect this Court's jurisdiction over the appeal by preventing the enforcement of Attorney

General Letter Ruling OR2018-20240 as to the disclosure of QF's confidential and/or trade secret information.

### B. Rule 24 Does Not Permit the Trial Court to Deny QF a Meaningful Appeal

Rule 24.2(a)(3) grants the trial court discretion to decline to permit a judgment to be superseded ***only if*** in doing so, the trial court can ensure that the judgment debtor will be protected in the event that an appellate court eventually determines that the trial court's relief was improper. TEX. R. APP. P. 24.2(a)(3). The Texas Supreme Court, in a case involving the disclosure of documents under the Texas Public Information Act, has held that while Rule 24.2(a)(3) provides the "trial court a measure of discretion … that discretion does not extend to denying a party any appeal whatsoever." *In re Dallas Area Rapid Transit*, 967 S.W.2d 358, 360 (Tex. 1998). The Supreme Court reasoned that:

> To allow a trial court discretion to refuse to supersede a judgment requiring production of information under the Act is to give that court the power to deny the governmental body any effective appeal, **for once the requested information is produced, an appeal is moot. The rule does not permit such a result.** DART has no adequate remedy by appeal. In fact, unless relief is granted, it will have no appeal at all.

*Id.* (emphasis added); *see also Hydroscience Techs., Inc. v. Hydroscience, Inc.*, 358 S.W.3d 759, 761 (Tex. App.—Dallas 2011, pet. denied) (reaching same conclusion in case regarding inspection of company's books and records); *Allibone v. Robinson*,

No. 03-17-00360-CV, 2017 Tex. App. LEXIS 6131, at *4-5 (Tex. App.—Austin June 29, 2017, no pet.) (reaching the same result in a case regarding production of documents pursuant to a subpoena).

Zachor attempts to distinguish *DART* on three meritless grounds. First, Zachor argues that *DART* involved a final judgment on the merits, not dismissal for lack of jurisdiction. But as discussed above, dismissal for lack of jurisdiction is a final judgment that is subject to supersedeas.

Second, Zachor argues that in *DART* the public body holding the information was the plaintiff. But that is irrelevant to the Court's ruling on the supersedeas issue. In *DART* and this case, disclosing records while the appeal is pending would render the appeal moot and cause injury to the appellant.

Third, Zachor argues that *DART* was decided before *In re State Bd. For Educator Certification*, 452 S.W.3d 802 (Tex. 2014). But that case was not a public records case and it approved the prior holding in *DART*, noting that it was "troubled that the trial court's refusal to stay its judgment effectively denied DART any appeal whatsoever, 'for once the requested information is produced, an appeal is moot'—a result 'the rule does not permit.'" *Id*. at 806. Moreover, the Court in *State Bd. For Educator Certification* denied supersedeas in order to maintain the status quo, by allowing the appellee to continue to teach while the state appealed a trial court's

order overturning an administrative revocation of his license. In contrast, here it is granting supersedeas that will maintain the status quo, as described above.

### C. QF Is Entitled to the Requested Relief

Zachor argues that QF failed to present evidence that it will be harmed, and that any claimed harm is illusory because federal law requires disclosure of the information at issue. [*See* Zachor Response at 9-12.] These arguments are irrelevant, unfounded, and mischaracterize the applicable legal standards.

First, QF is not required under Rule 24.2(a)(3) to show any harm to be entitled to the requested relief. Instead, "the trial court must set the amount and type of security that [QF] must post. The security must adequately protect [Zachor] against loss or damage that the appeal might cause." TEX. R. APP. P. 24.2(a)(3). Here, Zachor has not alleged, or adduced evidence of, any harm that it would suffer from a stay pending the appeal—because there is none. Therefore, a stay is not only required under the Rules but it would also not cause harm to any of the parties.

Second, the record is clear that QF will, in fact, be irreparably harmed in the absence of relief. As the Texas Supreme Court held in *DART*, if Zachor enforces the Attorney General open records ruling and obtains QF's confidential information while the appeal is pending, QF will be harmed by the denial of an effective appeal (as well as a trial on the merits in the event this Court reverses on the jurisdictional ruling). *In re DART*, 967 S.W.2d at 360.

Moreover, contrary to Zachor's assertion, QF presented evidence to the trial court of the irreparable harm it would suffer if its confidential information were disclosed, through the affidavit of Michael A. Mitchell, QF's General Counsel. [Exhibit 9 to Motion for Review at Ex. A, ¶¶ 10-17; *see also* CR at 350-352, ¶¶ 10-17]. Mr. Mitchell testified regarding QF's proprietary interest in the information, its efforts to protect the confidential information, and the competitive harm that it would suffer from its release—competing organizations could gain a competitive advantage by having the information necessary to outbid or offer more favorable terms to universities. [*Id.* at ¶¶ 10-17.] Zachor has not and cannot rebut this evidence.

A trial court may only decline to supersede a judgment where the judgment creditor (here, Zachor) can post a bond "that will secure the judgment debtor [QF] against any loss or damage caused" if the judgment on appeal is ultimately reversed. TEX. R. APP. P. 24.2(a)(3). Here, no amount of bond would protect QF from the irreparable competitive harm that it could suffer.

QF only seeks protection from harm that will occur from the release of QF's confidential information. QF does not attempt to assert the interest of Texas A&M, nor does it seek to prevent the disclosure of information required by federal law, as Zachor incorrectly suggests. Indeed, QF is fully supportive of its partner universities, including Texas A&M, complying with reporting obligations and in fact, contractually obligates them to do so. [Exhibit 9 to Motion for Review at Ex.

A, ¶ 11; *see also* CR at 350-352, ¶ 11] The information requested here, however, is different from and exceeds the scope of information required to be disclosed under 20 U.S.C. § 1011f(b)(1). And in any event, a disclosure to the Secretary of Education does not waive QF's right to protection. *See Waste Mgmt. of Texas v. Abbott*, 406 S.W.3d 626, 636 (Tex. App.—Eastland 2013, pet. denied) (holding that "[p]roviding trade secret information to a governmental body as required by it does not waive a company's trade secret protection."); *see also Taco Cabana Int'l, Inc. v. Two Pesos, Inc.*, 932 F.2d 1113, 1124 (5th Cir. 1991) (holding that a company did not lose or waive trade secret protections for information it was required to file with a municipality to obtain a building permit).

### D. Zachor's Other Arguments Concern the Merits of QF's Claims and the Jurisdictional Issue on Appeal

In its Response, Zachor includes several arguments regarding the merits of QF's claims and the jurisdictional issue on appeal. QF will address these assertions in full at the appropriate time, but they are addressed briefly below to clarify the actual issues in the Motion for Review.

First, Zachor attempts to conflate QF with the Qatari government by asserting that QF responded to a request for information about funding and donations received from the government of Qatar. [Zachor Response at 2.] In fact, Zachor specifically requested information about funding and donations from QF. [*See* Exhibit 2 to Motion for Review at Ex. A, p. 3].

Second, Zachor attempts to bootstrap the jurisdictional issue into the Motion for Review by arguing that QF is not entitled to any relief because Texas A&M is not a party to the lawsuit. According to Zachor, only Texas A&M has the authority to challenge the Attorney General's open records ruling—QF has no independent authority to do so—and therefore any order to maintain the status quo pending this appeal "amounts to an injunction against a nonparty – Texas A&M University." That is simply untrue. Both QF's claims and the relief sought in the Motion for Review are directed at the Attorney General. QF's underlying claims challenge the Attorney General's Letter Ruling OR2018-20240 regarding the release of QF's confidential information, and in its Motion for Review QF asks this Court to prevent that Letter Ruling from being enforced while the jurisdictional issue on appeal is resolved. QF does not seek any relief directly against Texas A&M—nor is it required to do so. *See* TEX. GOV'T CODE § 552.325(a), (b). All of the necessary parties are before this Court and the trial court.

## III. PRAYER

QF respectfully requests that the Court grant its Emergency Motion for Review of the Trial Court's Order Denying Appellant's Motion to Supersede Judgment Pending Appeal, and enter an order (a) suspending the enforcement of the Attorney General Letter Ruling OR2018-20240 as to the disclosure of QF's confidential and/or trade secret information, (b) enjoining Zachor from seeking to

enforce the Attorney General Letter Ruling OR2018-20240, and (c) for any other relief to which QF may be entitled.

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Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served in accordance with the Texas Rules of Appellate Procedure on the 20th day of March, 2020 on each of the following persons listed below by the means indicated:

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